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Concluding Reflections

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CONCLUDING REFLECTIONS

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A symposium to which one person contributes three extended papers is no unmixed pleasure for readers. This third contribution of mine will interest only those curious to see my response to other symposiasts' comments on my earlier efforts (in the symposium and elsewhere). To enable this curiosity to be satisfied as costlessly as possible, I divide these concluding reflections by authors rather than themes, though with priorities suggested by themes rather than authors.

I

Shearmur and Method in Natural Law Theory

Jeremy Shearmur's problems with my work arise from a misunderstanding of the *practical* character of natural law theory (as I conceive it). He both overstates and understates it.

As his title "*Natural Law Without Metaphysics*" suggests, Shearmur thinks that a theory which, like mine, aspires to be "purely practical" cannot respond to a *theoretical*, metaphysical challenge such as might be based on a Dawkins-like theory of the teleology of genes. He thinks that an "internalist" theory like mine aspires, as Dworkin's apparently does, to be purely internal, unwilling and unable to engage in metaphysical and scientific argument. He supposes that I agree with Dworkin that "external" sceptics need no answer.

In fact, however, my *Natural Law and Natural Rights* and *Fundamentals of Ethics* presuppose (though in varying senses of "presuppose") a number of strongly metaphysical positions, and indeed explicitly propose and in certain cases carefully argue for them: e.g., the four types of order, the reality and lastingness of free choice, the distinctness of the human species, the nature of human bodily life as distinct from the other basic aspects of human flourishing,[1] the existence of an uncaused creator, the principles of sound empirical judgment, and so forth.

I don't share Dworkin's unwillingness to challenge external skepticism about morality and practical reason and truth. Classic modern forms of such skepticism are vigorously argued against in both the above-mentioned books.[2] If someone were to seriously propose (as Shearmur even-

[1] Carefully explicated in J. FINNIS, J. BOYLE, JR., G. GRISEZ, NUCLEAR DETERRENCE, MORALITY AND REALISM, 304-09 (1987).

[2] *See* J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 73-75 (1980) [hereinafter NATURAL LAW]; J. FINNIS, FUNDAMENTALS OF ETHICS 26-53 (1983). Shearmur complains that I have offered no argument that all knowledge is a value, and questions whether the world is a better place for someone's knowing how many letters there are in a dictionary. He does not say whether or not he thinks my argument that skepticism about the good of knowledge is self-refuting is valid. I say that knowledge is valuable "in itself" just in the sense that it is an aspect of human flourishing; without it one cannot be flourishing. The subjects (objects) of knowledge have, I observe, internal hierarchies of worth. Normally, one can

tually shrinks from doing) that we are but instruments of our genes, and that the only true good is the survival of genes, I should gladly extend my already published arguments to take account of this new folly, for I agree with Shearmur that such a theory puts mine in question. I would argue what I now merely summarize: such a Dawkins-like proposal (i) is grossly guilty of the naturalistic fallacy, (ii) is quite implausible in restricting objective teleology to only one level, (iii) is radically unscientific in its generalization from data about genes without attending to the data about greater wholes such as human persons and their societies, (iv) has no plausibility in its articulation of a basic ethical principle, (v) is self-refuting in proposing that naturalistic explanations have the non-naturalistic property of overriding and excluding the affirmation of "non-naturalistic properties," and (vi) is self-refuting in its claim that the genes, in order to maximize their own survival, have set up human life, including human intelligence which (in Dawkins and co.) discovers that purpose and so (as Shearmur admits) frustrates it.[3]

I have been discussing Shearmur's overstatement of my theory's exclusively internal or practical character. I now turn to his understatement of that character. He fails to see that, in the parts of the theory which are strictly practical (a reflective, meditative restatement of practical understanding and reasoning), I am not seeking to *describe* the "phenomenology of moral action." I am not offering a "picture of our moral experience"; still less am I trying to read off my theory from such a picture, or from the experience itself. I agree with Shearmur that appeals to the phenomena of our moral experience are quite insufficient to show the objectivity of moral principles. It is a characteristic confusion and inadequacy of "phenomenological" modes of philosophizing that they do not, frankly, attend to the *objects* of our experience and our motivation so as to display and clarify their worth as objects, but instead focus upon the fact that those objects are present to our experience and motivation — a fact from which nothing follows. My theorizing is in another mode. Since Shearmur overlooks its strategy, he sees it as an argument-free attempt to read off ideas from the fabric of the universe, a performance dogmatic in content as well as tone.

I cannot restate my strategy here. I may give a flavor of it by quoting one key passage from *Natural Law and Natural Rights*; it begins the section entitled "The Basic Forms of Human Good: A Practical Reflection":

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be flourishing without knowledge of propositions such as "There are x letters in the dictionary." But sometimes even such normally trivial knowledge is an essential component of the important, worthwhile knowledge (knowledge about the origins, nature and destiny of our world, our societies, ourselves). In a society which superstitiously believes that the number of letters in the *Oxford English Dictionary* is a key to predicting the future because it mystically corresponds to the outer dimensions of the Great Pyramid in millimeters, it is good to know the sober truth about that number: it doesn't.

[3] This last instance of self-refutation is comparable to the instance sponsored by David Barnhizer in his quotation from Ernest Becker, in which we are *publicly* urged to preserve at all times the *fiction* that we have freedom and/or valid aspirations.

> It is now time to revert, from the descriptive or 'speculative' findings of anthropology and psychology, to the critical and essentially practical discipline in which each reader must ask himself: What *are* the basic aspects of my well-being? Here each one of us, however extensive his knowledge of the interests of other people and other cultures, is alone with his own intelligent grasp of the indemonstrable (because self-evident) first principles of his own practical reasoning. From one's capacity to grasp intelligently the basic forms of good as 'to-be-pursued' one gets one's ability, in the descriptive disciplines of history and anthropology, to sympathetically (though not uncritically) see the point of actions, life-styles, characters, and cultures that one would not choose for oneself. And one's speculative knowledge of other people's interests and achievements does not leave unaffected one's practical understanding of the forms of good that lie open to one's choice. But there is no inference from fact to value. At this point in our discourse (or private meditation), inference and proof are left behind (or left until later), and the proper form of discourse is: '. . . is a good, in itself, don't you think?'.[4]

Of course, any effort to propose and defend a non-skeptical, non-relativist view of the basic principles and concepts of ethics and politics (and thus of law) will meet with the classic skeptical epithet, "dogmatic."[5]

Shearmur complains that I "lay down" a number of principles of sound empirical judgment (norms of theoretical rationality) without discussing possible objections to them or alternative views of their status. True, I identify a number of such principles, for two purposes ancillary to the main argument about *practical* principles: to help explicate the concept of self-evidence,[6] and to exemplify the sort of rational (not logical) ne-

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[4] NATURAL LAW, *supra* note 2, at 85-86.

[5] Thus Sextus Empiricus begins the classical manual of skepticism: "The natural result of any investigation is that the investigators either discover the object of search or deny that it is discoverable and confess it to be inapprehensible, or persist in their search. So, too, with regard to the objects investigated by philosophy, this is probably why some have claimed to have discovered the truth, others have asserted that it cannot be apprehended, while others again go on inquiring. Those who believe they have discovered it are the 'Dogmatists,' specially so called — Aristotle, for example, and Epicurus and the Stoics . . .": OUTLINES OF PYRRHONISM I.1 (c.200 AD). This is a nice example of persuasive or rhetorical definition. The dogmatism of many skeptical arguments is obvious enough; it shows through, too, in Shearmur's incidental remark: "it [the question about an uncaused cause] hardly seems a question to which someone must think there has to be an answer at all (for example, if they hold a theory that explanation is inescapably relative . . .) . . . ." The question is whether a theory that *all* explanations must be relative can possibly be shown to be something "one must think"; without such a proof, this way of brushing off the series of *arguments* involved in the "cosmological argument" to an uncaused cause must seem at once dogmatic and evasive. If Shearmur points to the inescapable limitations of a symposium article, I accept the plea, and only ask the same sort of indulgence for my already over-lengthy NATURAL LAW AND NATURAL RIGHTS.

[6] NATURAL LAW, *supra* note 2 at 68.

cessity involved in arguing to the existence of an uncaused cause.[7] I introduce them with the warning that the self-evidence of any such principle or norm of rationality is consistent with the fact that a formulation of it may be in some respect inaccurate or not "acceptably refined and sufficiently qualified."[8] But the more pertinent warning, which I think Shearmur's criticisms about dogmatism rather overlook, is my general warning on the first page of *Natural Law and Natural Rights*:

> The book is no more than introductory. Countless relevant matters are merely touched upon or are passed over altogether. Innumerable objections receive no more than the silent tribute of an effort to draft statements that would prove defensible if a defense against objections were explicitly undertaken.[9]

If it is "false" that "an account or explanation of phenomena is not to be accepted if it requires or postulates something inconsistent with the data for which it is supposed to account," it is true that an account or explanation of phenomena is not to be accepted if it *both* requires or postulates something inconsistent with the data for which it is supposed to account *and* gives no reason to judge that the inconsistent phenomena are apparent rather than real. But in making this addition in order to meet Shearmur's objection, I make no change in my account of the norms of rationality. For I am doing no more than import into my statement of *this* principle the further principle which I had already stated — indeed, in the preceding sentence of my book. For I listed seven (out of "many") principles, and the sense of each is not independent of the sense of the others.

II

Luban, "rational choice" and incommensurability

A sound natural law theory grounds morality in what is good for human persons. The question immediately arises, therefore, whether reasonable and right choice is a matter of choosing the available option which offers *more good* (or less bad) than other available options. The simple — indeed simple-minded — thought that moral choice should be guided by the search for the greater good and/or lesser evil informs utilitarianism, Economic Analysis of Law, and other forms of aggregative, consequentialist, or in general (as I shall here call it) *proportionalist* moral reasoning. A sound natural law theory accepts that there are many appropriate comparisons between goods, and accordingly many appropriate uses for the terms "better" and "best" in the context of human choices.[10] But it goes on to point out that none of the comparisons which reason can make amount to the form of comparison — the form of commensuration —

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[7] *Id.* at 385.
[8] *Id.* at 68.
[9] *Id.* at v.
[10] *See* J. FINNIS, J. BOYLE AND G. GRISEZ, NUCLEAR DETERRENCE, MORALITY AND REALISM 261-67 (1987).

proposed by supporters of proportionalist moral theories. When morally significant *options* are in question, it turns out that an option better in one (or more) respect(s) is worse in another (or other) respect(s).

In making this critique of proportionalist moral theory, we do not trade on any general skepticism about commensuration. Luban thinks "it makes no sense to say that Kant is twenty-six times as famous as Mahan".[11] I am not so sure that this makes no sense. I am willing to entertain a high degree of (mathematically structured) commensurability — quantitative ordering — amongst very many types of objects. I only observe that, whatever proportionalist moral theorists mean by "greater" and "lesser" when they offer to guide morally significant, rationally motivated choice by identifying the option promising greater good or lesser evil, *that* form of commensuration cannot be made by reason. Our argument does not proceed from any *a priori* theory of commensurability, but from a dialectical consideration of the nature of human options and the conditions of human freedom of choice.

In early statements of the natural law theory developed by Germain Grisez, Joseph Boyle, myself, and others, the source of the incommensurability of options for morally significant choice was located in the diversity of categories of basic human good (life, knowledge, etc.).[12] This might be called "inter-categorial incommensurability." But while it is an important source of the incommensurability in issue, it is by no means necessary for such incommensurability, or its only source.[13] There is incommensurability also between choosable instantiations of one and the same basic good. For instance, what makes vacationing at the beach appealing and what makes vacationing in the mountains appealing — such alternatives are incommensurable in the sense that each possibility has some intelligible appeal not found in what makes the other appealing.

So David Luban's statement that "Finnis believes that interdimensional comparisons are impossible because the basic goods are incommensurable"[14] needs important qualification.

A more basic misunderstanding underlies Luban's main critique. He asks: "What is the connection between commensurability and rational choice that Finnis is exploring?" And he answers:

> Finnis appears to be arguing . . . that if rational choice among goods is possible, they must be commensurable. For though he does not state this latter point in so many words, he does offer the logically equivalent claim that incommensurability of goods implies that rational choice among them is impossible. Indeed, this claim is the central point of his argument . . . .[15]

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[11] Luban, *Incommensurable Values, Rational Choice, and Moral Absolutes*, 38 Clev. St. L. Rev. 65,66 (1990) [hereinafter Luban].

[12] *See, e.g.*, NATURAL LAW *supra* note 2, at 113.

[13] This is already indicated in J. FINNIS, FUNDAMENTALS OF ETHICS 95 (1983) and more explicitly in Grisez, Boyle and Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 AM. J. JURIS. 99, 110 (1987).

[14] Luban, *supra* note 11, at 69.

[15] *Id.* at 67-68.

Well, if the words are being used in the sense in which I use them, Luban has got things upside down. My claim is not that commensurability makes rational choice possible. It is that commensurability makes rational *choice impossible*.[16] My claim is not that incommensurability implies the impossibility of rational choice. It is that incommensurability implies the *possibility* of rational *choice*. These are indeed the central claims of my paper.

Behind this apparently catastrophic misunderstanding lies a less dramatic, verbal explanation. The term "rational choice" has three important, distinct senses:

(1) choice which is fully reasonable, complies with all the requirements of practical reasonableness, and is thus morally upright;
(2) choice which is rationally motivated in the sense that its object has been shaped by practical intelligence and has rational appeal, even if it is in some respect(s) motivated by feeling rather than reason, feelings which have to some extent fettered and instrumentalised reason, and is therefore unreasonable and immoral, though rational;
(3) decision and action motivated by a dominant reason, i.e., a reason which can be commensurated with the reasons for alternative options and which includes all that these offer and some more.

Sense (3) is the sense in which Luban uses the phrase "rational choice." I use it in sense (2) (or senses (1) and (2)) but never in sense (3), except in one incautiously phrased sentence in part IV where I am explicitly reporting the views, and implicitly the self-description, of the "game" and "decision" theorists (who are interested only in sense (3)). For the whole point of my argument about the relation between incommensurability of options and rationally motivated, morally significant free choice is that if one option dominates the others (i.e., offers *unqualifiedly* greater good or lesser evil), the others cease to have rational appeal; but morally significant, rationally motivated *choice* is *between alternative options* each of which has rational appeal; therefore where one option is dominant, deliberation ends not in choice but in *insight* (into the unqualified rational superiority of that option) and *action*.[17]

Virtually the only realistic context in which an option can rationally be regarded as dominant is within the confines of "third order," "technical" reasoning and action, e.g., competitive games. "Game theory" is the name of a vast and sophisticated body of reasoning about situations of ordinary life (e.g., "bargaining") conceived *as if* they had the simple, unitary-goal, and typically self-interested structure of a competitive game, where there

[16] Subject only to a qualification about resisting the temptation to purely emotionally motivated choice, a matter irrelevant to proportionalism's methodological concerns. See my comments on part III of Luban's paper, below.

[17] This, again, is subject to the qualification mentioned in the preceding footnote.

is no ambiguity about what counts as winning and losing and the only problem is the individual player's problem how to win (or avoid defeat, or minimize one's defeat). The very first axiom of game theory is the axiom of transitivity: if *a* is better than *b* and *b* is better than *c*, then *a* must be better than *c*; if *x* is worse than *y* and *y* than *z*, then *x* is worse than *z*; etc.[18] Clear-headed masters of game theory acknowledge that in real life, *in*transitivities abound: *a* is better than *b* in one respect (e.g., proximity to school), and *b* is better than *c* in another respect (e.g., physical amenities), but since the two bases of comparison (proximity and amenities) are not commensurable with each other, it does not follow that *a* is better than *c* in any respect, let alone unqualifiedly better.[19]

In short, Luban reserves the term "rational choice" for the peculiar situation of games and other technical operations considered technically. He does not notice that in my usage of terms, there is no choice in such situations, only calculation and judgment.[20] (The word "decision" is particularly liable to confuse, here, since in common idiom it is equivocal between *judgment* — i.e. rationally compelled conclusion to calculation — and *choice*.)[21]

Thus Luban, asserting that for me "incommensurability of goods implies that rational choice among them is impossible," and that this is indeed my central claim, adds:

> Finnis insists that if states of affairs are truly incommensurable then no rational grounds exist to criticize someone who instead chooses the road not taken.[22]

Not so. I in no way reserve the term "rational" for game theoretical or other technical contexts. Choice between incommensurable options is often rational in two ways: (a) inasmuch as it opts for the chosen option for the reasons which make that option rationally appealing (even though

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[18] *See* R.D. LUCE & H. RAIFFA, GAMES AND DECISIONS ch. 1 (1957).

[19] So Luce and Raiffa are reduced to saying: "We may say that we are only concerned with behavior which is transitive, adding hopefully that we believe this need not always be a vacuous study." *Id.* at 25. On the same page they acknowledge the typical cause and effect of intransitivities: a topic or situation forces "choices between inherently incomparable alternatives. The idea is that each alternative invokes 'responses' on several different 'attribute' scales and that, although each scale may itself be transitive, their amalgamation need not be." *Id.*

[20] In his footnote 32, Luban (after asserting the substantial identity of two substantially different theses) expresses the view that my understanding of free choice is "existentialist," and associates himself with the view that the good person's actions are *determined*. The latter view is either rhetoric or a grave misunderstanding of the conditions of moral goodness, praiseworthiness, and in general responsibility. The former view labels "existentialist" a basic insight of Judaeo-Christian anthropology which is a permanent, philosophically warranted acquisition of natural law theory: *see e.g.*, BOYLE, GRISEZ AND TOLLEFSEN, FREE CHOICE (1976).

[21] Notice that in the second, third and fifth sentences of part 1C of his paper, Luban actually equates "choice" with "rational choice" with "rational *solution* to [a] *decision* problem." Luban, *supra* note 11.

[22] *Id.* at 68.

those grounds do not make that option unqualifiedly more appealing than alternative options); and (b) inasmuch as it conforms to all the requirements of practical reasonableness which we call moral, e.g., fairness, consistency, exclusion of any choice to destroy, damage or impede any basic human good, etc. Both (a) and (b) provide rich grounds for rational criticism of choices.[23] There is only one sense in which the last quotation from Luban is true: the *mere fact* that A chooses *x* while B chooses *y* does not entail that there is rational ground for A to criticize B or for B to criticize A.[24]

All this leaves, however, a number of interesting observations by Luban on the question of commensurability. Some of these, while interesting in themselves, are of peripheral relevance here, because they are based on his erroneous assumption that I grant, if only *arguendo*, the "*intra*-dimensional commensurability of the basic goods" — and he wishes to dissuade me from conceding this. No dissuasion is necessary. In the senses relevant to Luban's critique, I never grant such commensurability, even *arguendo*. I do analogize the incommensurability of options in morally significant choices to the incommensurability of weight and area prior to the *adoption* of measures. But one should not press the analogy into a granting of something irrelevant to my point (which was not that weight *is* commensurable with weight after the adoption of a measure, but that, prior to adoption of measures, weight is *in*commensurable with size). And in my critique of Dworkin, I do grant, *arguendo*, the intradimensional commensurability of "fit" and "soundness." I ought to have made much clearer than I did that this incommensurability is only analogous to, not an instantiation of, the incommensurability of rationally choosable, morally significant options.[25]

So I need not attend to the details of Luban's "Nash-style" argument, designed to dislodge a "background assumption" which I do not make. But one observation may be helpful here, as an introduction to the much more important and interesting question of "large-small tradeoffs."

The observation is this. The availability of a unique "Nash solution" depends on "rationality assumptions," "constraints" or "axioms." But the arguments of sound natural law theory against proportionalist ethics have never denied that unique solutions (commensurability; "decidability") are available *if enough assumptions are made*. Moreover, if some of the assumptions on which the unique solution depends are, as Luban seems to admit, assumptions alternatives to which can be rationally en-

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[23] Lynn Henderson's fear that the incommensurability thesis paralyses deliberation and decision is quite groundless. Henderson, *Whose Nature? Practical Reason and Patriarchy*, 38 CLEV. ST. L. REV. 169,181 (1990) [hereinafter Henderson].

[24] Notice that, in the proportionalist model of moral reasoning, in which the task of deliberation is to identify the unqualifiedly greater good or lesser evil, the mere fact that A decides for *x* and B (in the same situation) decides for *y* entails that either A has rational ground for criticizing B, or B has rational ground for criticizing A.

[25] See new footnote 18 in Finnis, *Natural Law and Legal Reasoning*, 38 Clev. St. L. Rev. 1,9 (1990).

visaged, then the solution is not truly (rationally) unique. Making such "assumptions" is *making a choice* (in my sense of choice, between rationally appealing alternative options). And natural law theory's thesis about incommensurability has never denied that commensuration is possible *after* certain strategic choices have been made.[26]

This point can be clarified by considering the examples Luban discusses in perhaps the most interesting part of his interesting paper, concerning the "large-small tradeoffs" which "we press into service against moral absolutists" (like me). Luban's engagingly frank phrase "press into service" already suggests a willed, prior determination to exclude the "absolute" moral judgments for which the field lies open if proportionalist commensurations can be shown to be irrational. But his willingness to argue for proportionalist commensuration is more important than any such resolution to beg the question. So I shall attend to the arguments, which develop largely by way of examples.[27]

Case 1, the college athlete. Luban suggests (a) that it is irrational for him to devastate his studies by undertaking a rigorous training program, and (b) that this irrationality exemplifies a commensurability between the basic goods of health, knowledge and excellence in work/play — a commensurability in the case where the gain (or loss) in one basic good is very great and the loss (or gain) in another basic good is very small: "large-small tradeoff". I do not question (a). But (b) is mistaken. The commensuration we make or presuppose when we judge it irrational for this athlete to undertake the program is made possible not by the size of the respective gains and losses in different basic goods, but by the plan of life which this athlete has *already adopted* (chosen) — by his commitment to whatever he needs his college studies for (medical practice . . ., classical scholarship . . .). We could judge the *very same* gain in athletic proficiency and loss in scholastic performance *rational* if we were told that this young man is in college in order to get into the pro's.

Case 2, the trial lawyer. As in Case 1, the options (prepare cross-examination; sleep to avoid feeling tired) are easily ranked *by her commitment* to legal practice. It is of some importance to notice that Luban is mistaken in assuming that tiredness involves damage to a basic human good. In fact it does not, unless it significantly damages health. Tiredness

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[26] Some of the other "assumptions" in game/bargaining theory are designed, as Luban observes, to preserve "fairness." But again, natural law theory's incommensurability thesis has never denied that *moral* standards of judgment can identify certain options as "irrational" i.e. unreasonable, morally bad. The fact remains that immoral choice is possible precisely because immoral options can remain rationally appealing in a way which proportionalist ethics leaves incomprehensible. I may add that natural law theory, which acknowledges the rationality of choices made in the absence of "unique solutions," will scarcely be concerned to deny the existence of "unique solutions" that depend upon a *lottery* between alternative options (the fourth of Luban's Nash-assumptions).

[27] In attending to Luban's arguments, I shall not repeat what I have already observed, particularly that he is mistaken in his assumption that the incommensurability thesis *depends* upon establishing cross-categorial incommensurability between categories of basic human good.

which does not threaten health is repugnant; like pain it is an emotional *bad* but is often an *intelligible* good, being the bodily sign of the need (for health's sake) to cease activity, and a stimulus to doing so. When health is not at stake, it is irresponsible for a professional to skimp on preparation "urgently required" for fulfilling the responsibilities established by the usual norms of that profession and thus by the reasonable[28] expectations of the client.[29] Once again, one who has made a prior choice can often, and easily, make a rational commensuration between options, including options involving different basic goods.

So Luban's "Finnis to the contrary" was misdirected: I have no difficulty in accepting that, in each of these two cases, one of the options is irrational, i.e., unreasonable for that person.

Luban's other examples in his section on "large-small tradeoffs" are of less interest, because they concern comparisons, not between morally significant options in the third order but cultural-technical objects in the fourth order. For the book designer, a gain in page-size of 50 per cent outweighs, *ceteris paribus*, a two per cent increase in weight. But the *ceteris paribus* clause is important. As soon as one brings the object out of the purely technical sphere into a relationship with relevant human goods, the assumption that other things are "equal," i.e., irrelevant, comes into question. A two per cent increase in weight can be intolerable to mail-order purchasers, and a 50 per cent increase in size unacceptable to librarians, wartime paper rationers, and so on. As for Luban's comparison of judgments which differ slightly on "fit" but greatly in "moral attractiveness," or vice versa, I simply deny that the postulated great disparity in the differences makes it *per se* rational to prefer the judgment which is better on the criterion where the difference is very great. I note that Luban is uneasy here; he says only that "many of us would think . . . ." Dworkin, for one, has disagreed: below the "threshold of fit," moral soundness is irrelevant; above the threshold of fit, only moral soundness counts.

I may add that I regret two things about my discussion of incommensurability in "Natural Law and Legal Reasoning." As I have already remarked, I should have made it clearer that the incommensurability between Dworkin's two dimensions is not an instantiation of, but only a kind of analogy to, the incommensurability between the human goods involved in morally significant, rationally motivated choices. And I should have made it explicit that I was only granting *arguendo* the intelligibility of Dworkin's talk (a) about measuring degrees of moral soundness and (b) about trading off moral soundness against fit; in fact, I cannot reconcile either of these crucial features of Dworkin's analysis (and Luban's example) with any acceptable concept of morality.

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[28] What is reasonable is established not by some pre-moral aggregation of goods but by customs and conventions established by the choices characteristic of a certain culture, choices which will be upright if fair.

[29] But when health is at stake, the options once more appear incommensurable. Still, even when her health is at stake, *this* professional *may* find the options rationally commensurable, *if* she has made a prior commitment to fight this case "at all costs," i.e., self-sacrificially. Accepting severe personal loss as a side-effect of devotion to a good cause need not be either irrational or unreasonable.

What should be said about Luban's other example of cross categorial comparison, the decathlon score chart? First, that the moral he wants to draw from it is irrelevant to sound natural law theory; for this theory does not seek to dismiss the possibility of rational cross-categorial comparisons; it merely observes that where such commensuration between options is possible, there is no free choice of the sort that proportionalist ethical theories offer to guide. Second, Luban entirely misstates the source of the rationality of the decathlon score-table. Its rationality is the rationality of a *fair* comparison between different types of track and field athletic performance: the problem is to determine the best overall track and field athlete, and the challenge is to devise a scoring system which (a) will not *give* any one type of performance a priority which it doesn't have relative to overall track/field athletic superiority, and (b) will not include criteria (e.g., memory) which are irrelevant to track/field athletic prowess. Luban's talk of "accuracy" is misdirected. Moreover, the score-table does not allow us to say that an athlete who scores 1100 in one event is a better athlete than one who scores 1050 in another event; it only allows us to say that one who scores more in the ten events is better overall *as a track and field athlete* — a culturally determined category. *This* sort of cross-categorial commensuration has — as Luban perhaps concedes — only scant analogy with the problem involved in morally significant choices outside the frameworks of comparison established by prior commitments.

Luban's part III makes, very shortly, two points. The confusions involved in the first I have already dealt with. But the second obliges me to clarify my use of the shorthand phrase "morally significant choice." As is made clear in the parallel discussion in *Nuclear Deterrence, Morality and Realism*, but not in "Natural Law and Legal Reasoning," this use is not intended to deny the moral significance of successfully overcoming temptations to choose, for emotional motivations, options known to be rationally (e.g., morally, or "prudentially") inferior. If it were possible to do the proportionalist commensuration and to identify the option promising unqualifiedly greater good (or lesser evil), there would still remain a "choice" of a "morally significant" sort, namely, to succumb to or resist emotional motivations such as fear or lust. *But that is not the problem which proportionalist ethics offers to solve.* My discussion of "morally significant choice" was not an attempt to say everything which can appropriately be said about what is and is not morally significant in human deliberation and action; my discussion was focused entirely on the proportionalist claim to be able to guide morally significant, *rationally motivated* choice, i.e., choice between options each of which is *rationally* appealing.

Although (or because?) it involves a series of mistakes and misunderstandings, Luban's discussion of moral absolutes is well worth careful attention. For here as elsewhere the mistakes are by no means peculiar to him, but are signs, causes and effects of the ramifying grip of proportionalist thinking.

A first large mistake is, once more, about my meaning. Throughout this section, Luban says and supposes that, according to me, "we cannot identify reasons *for* an option" and "cannot identify reasons for promoting basic good." He even attributes to me the pure incoherence of holding in one and the same breath that where there are reasons for O_1 and reasons for O_2 there is no reason for either O_1 or O_2! This is all quite groundless, and flat contrary to the text he quotes from me at n.31 of his paper.[30] Unless there are reasons for an option, *and* for alternative options, rationally motivated choice of either option is impossible; and my primary concern is with rationally motivated, morally significant choice. Luban has simply confused "The reasons for O_n are not rationally preferable to the reasons against O_p" with "There are no reasons for O_n." More briefly, he has confused "a reason" with "a reason sufficient to override a contrary reason."

Fortunately, the other mistakes in his discussion are more interesting and fruitful. Particularly interesting is his denial that there is an asymmetry between reasons for and reasons against. But his discussion remains at the level of a purely verbal logic of convertibility, and overlooks the fundamental context of all human choosing. Options which there are reasons *for* my choosing are infinite in number. Being finite, I simply cannot do everything, cannot choose every option for which there are reasons. But I can refrain from doing anything; I can respect every reason *against* choosing options. A further ground of the asymmetry is that many human goods (e.g., the lives of others) are gifts, givens, which we can destroy but cannot create.

Luban goes on to ascribe to me the view that "Forbearance from damaging basic goods is the default position."[31] This repeated summary is hazardously equivocal. As much of my paper was concerned to stress, the distinction between intended harm and harm done as a side-effect is fundamental to my argument, and to the whole conception of specific moral absolutes. So my view had better be summarized as: "Forbearance from choosing to damage basic goods is the default position" or, equivalently, "Forbearance from intentional damage to basic goods is the default position." And again, this morally vital distinction between intention and side-effect is rooted in the fundamental context of all human choosing and acting: we *cannot* avoid damaging human goods as a side-effect of our choices, but we *can* always refrain from choosing to damage them, i.e., from intending to damage them, i.e., from damaging them intentionally.

Later still, Luban shifts to the more precise formulation: "Forbearance from intentionally injuring basic goods is the default position." But immediately he makes it clear that, for him,[32] "intentionally" means no

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[30] However, that sentence, as I note in a new footnote to my paper, needs qualification; when basic human goods are at stake and provide the reasons against an option, there can be reasons *for* the option but they *cannot* be rationally preferable.

[31] Luban, *supra* note 11, at 81.

[32] As for Henderson, too, see Henderson, *supra* note 21.

more than "knowingly" and does not make the vital distinction between intended results and side-effects. So, he says, "When I tell a panhandler to get lost I am intentionally failing to promote a basic good," and he calls this an "intentional lapse" and "intentional bad Samaritanism." All this utterly confuses two quite different types of willing: In telling a panhandler to get lost, I certainly act intentionally, and I certainly intend that he should get no money from me; what is not certain is that I intend him to starve. I may be intending him to starve; I may want him to suffer because I resent him (i.e. as an end in itself), or to deter him and others from future begging (i.e. as a means). In these cases, his starving is intended by me because it is chosen by me *as an end or as a means*. If this is what Luban had in mind when he spoke of "intentionally failing to promote a basic good," then I agree that this is morally equivalent to "actively injuring." Quite different is the case — equally covered by Luban's vague phraseology and loose conception of intention — where I intend that this panhandler should get no money from me because I am on my way to give the available money to somebody else in need; here I may know that the panhandler will starve, but I in no way intend that side-effect of my choice.[33]

Luban assumes that my "default position" is not meant to cover intentional omissions as well as intentional actions. But it is! My only proviso is that "intentional" must here be understood as signifying, not merely "knowingly causing," but choosing as an end or as a means. A sound theory of natural law does not sponsor Luban's "homely intuition" that "sins of commission are worse than sins of omission."[34] Leaving one's baby behind on a lonely mountain top and omitting to tell rescue services, because one intends the baby to die, is as bad as drowning it. Luban's phraseology hereabouts is shot through with ambiguities foreign to a sound ethics. "Killing you is morally worse than letting you die" is true if "letting you die" refers to a side-effect fairly accepted, but is false if the ambiguous phrase refers to an intended putting to death by a policy of omissions — a form, in fact, of killing.

Ethics judges actions as *shaped by the will*, i.e., *as motivated*. Luban's willingness to analyze an action such as pushing a button independently of what he vaguely calls "motive" removes his discussion from the proper sphere of the ethical. Although his description of Lichtenberg's artificial predicament is far too ambiguous to warrant the conclusion that "it is clear that [pushing and not pushing the button] are morally equivalent," a sound natural law theory can easily accept — indeed, has always proclaimed — that considered independently of the motives (reasons) which shape choices, the distinction between actions, i.e., chunks of physical

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[33] Note: this analysis of intention and side-effect does not settle the morality of the second choice; my rejection of the panhandler's plea in favor of somebody else's *might* be unfair; this panhandler might be my own son, and/or I may be favoring the other person in order to win future illicit favors in return. Side-effects can be unfairly, immorally imposed. But, they can also be fairly imposed, whether by "act" or "omission."

[34] Luban, *supra* note 11, at 82.

behavior, and omissions carries no moral weight. For chunks of physical behavior, as such, carry no moral weight. Natural law theory's vital distinction between affirmative and negative responsibilities is not to be confused with the conventional, physical-behavior oriented and ethically indeterminate distinction between actions and omissions.

There remains one last shot in Luban's critique of my sketch of the case for moral absolutes. Once again, it is an example, rather than an argument: "by lying to a Gestapo spy you are able to save hundreds of innocent lives."[35] But, now the example must stand on its own since Luban failed (I have argued) in his earlier attempt to show that large-small tradeoffs are an exception to the incommensurability (prior to moral judgment and choice) of morally significant options.

Luban thinks it indubitable that the lie is "rationally preferable to truth-telling." Already his discussion has derailed, for the question is not whether lying is rationally preferable to truth-telling but whether it is rationally preferable (independently of moral judgments and standards) to the alternatives to lying — and these alternatives include silence, inviting the spy to have a cigarette or to join in a hymn, suicide, attacking the spy, and so forth. Proportionalist "calculations" of the greater good or lesser evil (and thus of the "rationally preferable") characteristically proceed by arbitrarily restricting the range and content of the comparisons, and this is Luban's first arbitrary restriction.

His next is equally characteristic of proportionalist method; to eliminate the calculation of comparative risks one simply helps oneself to a "knowledge" of the alternative outcomes. So here, Luban tells us that, on the one hand, this lie will "only slightly damage" human goods while, on the other hand, it *will* (he implies) save hundreds of lives. But, ethics concerns options, i.e., future actions and their consequences, and these consequences are not known to us. The choice to lie to this spy here and now is a choice to lie "when it seems necessary, or very advantageous" and the consequences of this choice spread out far beyond the situation under consideration. It is a choice to adopt a certain stance in the world, a certain character, and the consequences of *this*, for good and ill, are indefinitely and unpredictably wide, lasting and serious. Equally, the hoped-for good effects of the lie are not yet facts but are possibilities, whose probability, like all probabilities of one-off events, is a matter of speculation, and whose further consequences are even more speculative.

None of the points I have just made suggest that it is unreasonable to want to save the hundreds of lives and to want the spy to remain in an ignorance, or act under a delusion, which will tend to save those lives. My argument is simply that *reason* does not authorize the conclusion that the harm to human good indubitably done *in*, and potentially resulting *from*, the act of deliberately asserting a false proposition with intent to deceive is objectively *less than* the gain to human good from the hoped-

[35] Luban, *supra* note 11, at 80.

for effects of subsequent choices expected to be made by the person so deceived and those whom he himself unwittingly deceives. The *feeling* that one course of action is rationally preferable to the other comes from a failure to assess the alternatives evenhandedly, including in the assessment all the relevant reflexive effects on character and the differential but hardly calculable levels of probability or risk.

Our 72-page analysis in *Nuclear Deterrence, Morality and Realism* of (a) the attempts of pro-deterrent proportionalists to identify nuclear deterrence as the lesser evil, and (b) the equally futile attempts of anti-deterrent proportionalists to identify it as a greater evil, shows clearly enough that aggregative, pre-moral reasoning is impotent to make the assessments which proportionalist ethical theory demands, and that what does the work in these "calculations" is *feelings* — the (justified) fear of tyranny, the (justified) fear of nuclear holocaust, the (partly justified and partly unjustified) concern for self and friends in preference to future generations, etc. And feelings are characteristically able to do this (self-deceptive) work because the comparison of alternative options is not rigorous and even-handed. Luban's loaded account of his lying-to-the-Gestapo case exemplifies well enough these rational deficiencies of proportionalist moral methodology.

Finally, Luban makes another closing shot, at the asymmetry between affirmative and negative responsibilities: "there is no more reason to enact a law prohibiting murder than to enact a law positively requiring state intervention to fight famine."[36] I think he is mistaken here, too. There can be no state without some law against killing of human beings, and the requirement of fairness demands that this law be generalized. But the state *need* not get into the business of famine relief. There will be many situations in which it is appropriate, and an implication of fairness, for the state to organize and supply famine relief. But equally, there will be many situations where it is just and altogether reasonable to leave this up to families and other non-state networks.

Indeed, natural law principles, which universally require everyone to refrain from killing the innocent, do not *universally* require the establishment of a state and, therefore, do not universally require the enacting of a positive (state) law against murder: consider the situation of Eskimos for many centuries.[37] So the final sentence of Luban's paper needs qualification, too: given a lot of contingent (in the sense of non-universal) factors, we should say that natural law requires the formation and maintenance of a state and thus of a law against murder; given *further* contingent factors, natural law requires also the politically organized redistribution of wealth to satisfy "welfare rights."

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[36] Luban, *supra* note 11, at 84.

[37] A brief comment on Luban's footnote 11 concerning (a) work and (b) political participation. *Work* was mistakenly omitted from the summary lists of basic human goods in NATURAL LAW, *supra* note 2, and FUNDAMENTALS OF ETHICS, *supra* note 2. But, I never blankly claimed that "the list is exhaustive"; rather I expressed both the intention to provide an exhaustive list and a clear acknowledgement of "the scope that exists for modification of the details of the list," a

III

Barnett and "consequentialism"

Randy Barnett hopes to replace "conflict between modes of analysis" with a relationship of "redundancy" between them, such that one backs up another and takes over when the other runs out. The principal modes of analysis he identifies are the "consequentialist" and the "deontological or rights-based."[38]

I fear his hopes are misplaced. Redundancy in aircraft design relates not to conflicts between systems, but to the availability of a backup system when the primary system has been defeated by other circumstances or by its own internal failure. But between consequentialist and non-consequentialist[39] ethical theories or systems there is a genuine conflict. Each entails that the other is false and unacceptable, whether as a primary system, a backup method, or at all. Between these systems or methods or modes of analysis there can be no co-existence. They stand to each other as a propellant system stands to an auto-destruct system primed to detonate as the aircraft reaches take-off speed.

The important thing to notice is that a decent ethics — a sound natural law theory — is *concerned through and through with consequences* (and so, in a weak sense, might be called "consequentialist"). But since the

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list which "there is no need for the reader to accept . . . just as it stands". NATURAL LAW, *supra* note 2, at 92. My own modification of the list, replacing "play" with "excellence in play and work for its own sake" is made explicit in Grisez, Boyle and Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 AM. J. JURIS. 99, 107 (1987). I do not consider that this requires any significant modification of the quite complex discussion of private ownership of the means of production in NATURAL LAW, *supra* note 2, at 169-73. As for the "good of political participation," Luban's arguments that it is a basic good are clearly fallacious; The fact that sociability extends to beings who have no political life (brute animals) in no way entails that political participation is not a form of the sociability peculiar to beings who can and need to associate in a deliberative way (human persons). And to say that political action lifts us out of our social station is not to say that it lifts us out of society. But there is no need to speculate that I assimilate political participation to sociability. In NATURAL LAW, *supra* note 2, at 149, I offer a complex analysis of political participation, suggesting that it involves a number of goods over and above the basic good of sociability, including the basic good of play and other goods and rationales. I think Arendt spoke in some respects sentimentally and loosely about political participation, just as she exaggerated the distinction between *homo ludens* and *homo faber*.

[38] He also treats "(substantive) justice" and "(formal) rule of law" considerations as different modes of analysis. This seems to me mistaken; these are different topics of analysis, not different modes of analyzing the same topic. Oddly, his conception of "justice" includes non-consequentialist norms such as "the guilty should be punished," while his conception of the "rule of law" includes "forward-looking," if not downright consequentialist norms such as "police irregularities should be deterred." I am inclined to think that a rule excluding illegally obtained evidence is opposed both to justice and the rule of law. But these un-American thoughts of mine need not be pursued here.

[39] Not safely called "deontological": *see* FUNDAMENTALS OF ETHICS, *supra* note 2, at 84.

overall net best consequences (the greatest good, the lesser evil), relative to the options available in situations of morally significant choice, cannot be identified prior to moral judgment and choice, consequences are not to be pursued according to the incoherent, futile (and thus ethically false) consequentialist method, but in conformity with all relevant moral norms.

For example, feeding one's children has the good consequence that they stay alive and capable of participating in all the other basic human goods, can support one in one's old age, can become productive members of society, and so forth. Principles of fairness, fidelity to commitments, etc., generate the strong moral norm, the affirmative moral responsibility: "Feed your children!" But if the only food available is the flesh of the children living next door, you must not feed your children — for there is another moral norm which excludes *choosing* to damage the good of life and health *as a means* to any end however worthy. The relationship between the affirmative moral norm prescribing feeding one's children and the negative moral absolute[40] proscribing intentional harm is only superficially one of "conflict." The tension between them is intra-systemic. The two norms are capable of being accurately stated in a single coherent rule-with-exceptions.

An example closer to the lawyer's concerns is the firm tradition of natural law theory concerning judicial duty. "Never convict the innocent" is an important moral norm of judicial responsibility. But it is consistent with another important moral norm: "If the only evidence of innocence is inadmissible, you may rightly, and often should, convict."[41]

IV

Barnhizer and fairness

The moral question underlying the constitutional issue in *Croson* was whether the Richmond Plan was fair. David Barnhizer is convinced that it was. His reason seems to me to focus on "the need to create basic life opportunities for racial minorities who have been deliberately prevented from participating in the economic and political system," the need for a "rectification of known conditions of injustice."

I in no way question these needs when I suggest that some further questions call for answers before one can be sure the plan was fair. Suppose the effect of the racial quota is that thirty per cent of construction contracts go to members of the defined racial minorities, and the re-

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[40] Note: All the specific moral absolutes proposed in natural law theory are negative; there is not and cannot be an absolute duty to preserve human life as David Barnhizer supposes in Barnhizer, *Natural Law as Practical Methodology*, 38 CLEV. ST. L. REV. 15, 24 n.29 (1990). Conversely, these moral absolutes, which are entailed by the first principles of practical reasonableness, *do* (*pace* Barnhizer) dictate *some* specific answers for the judge (though they leave many questions unanswered).

[41] *See* T. AQUINAS, SUMMA THEOLOGIAE II-II q.64 a.6 ad 3; q.67 a.2c; NATURAL LAW, *supra* note 2 at 345.

maining seventy per cent go to large, wealthy corporations; and suppose that in the absence of the racial quota, twenty per cent of the contracts would go to businesses owned by and/or employing poor members of the majority race — who as the result of the quota are put out of business and/or employment. These facts would not entail, inexorably, that the Plan is unfair. But equally, the needs of the designated racial minorities do not entail that the Plan is fair.

The question is whether those who decided upon the Plan really had the needs of all relevant needy parties in mind, and were not deflected by irrelevant considerations such as that they desired the votes of one group more than the other, or wanted the votes of those who, on racial grounds, sympathize with one group more than the other.

This impartiality is a primary component in what is meant by saying that the legislator must act for the *common* good. This has very little to do with aggregation, or "the greatest good of the greatest number." It has very much to do with a real, unfeigned willingness on the part of each legislator to do to or for *all* members of the community what he or she is willing to be done to or for himself, herself, and those he or she holds near and dear.

It seems to me to be often the case that the legislators in our Western communities, being well-off themselves, impose schemes of redistribution which (are designed to) benefit the very poor *at the expense of the not-quite-so poor rather than at the proportionate expense of the well-off.* I would like to be sure that the Richmond Plan was not tainted by this sort of injustice. I am inclined to think that Barnhizer's critique of Justice O'Connor's opinion fails to respond to a number of points made in the judgments of the six majority Justices, not least the point put thus by Justice Stevens concurring:

> instead of carefully identifying the characteristics of the classes of contractors that are respectively favored and disfavored by its ordinance, the Richmond City Council has merely engaged in the type of stereotypical analysis that is the hallmark of violations of the Equal Protection Clause.[42]

V

Tushnet and easy cases

Mark Tushnet comes round to acknowledging that my concept of practical reasoning is not tied to the class-conceptions of a legal profession subservient to the interests of corporations. More interesting is the idea he attributes to Alasdair MacIntyre, that practical reasoning comes into play only when there is a difficult decision to be made. This idea is, I

[42] City of Richmond v. J.A. Croson Company, 109 S. Ct. 706, 732 (1989).

think, a mistake.[43] There is need for practical reasoning even in an easy case, just as there is practical reasoning in the game-theoretical situations where, on my conception of (rationally motivated) choice, there is no choice because one option can be shown (perhaps quite easily) to be dominant for the potential chooser in question.

I think easy cases and highly determinate rules (whose existence Tushnet concedes) are a very important part of the law and of legal practice. And "easy legal reasoning" is a very important element in the structure of almost all hard cases; the "hard" issue in such cases is usually quite distinguishable from many other, more or less easy issues which are present in the case (and are perhaps disputed at the trial and even, to some extent, at the first appellate stage). The easiness of easy cases may be of less interest to lawyers (though in fact they should and do welcome the manageability it brings to the identification of distinct "hard" issues). But it is of the highest interest and importance to ordinary folk (not to mention corporations). And it is very important to the justification of law's claims to be just, and thus to its claims on our rational, morally motivated obedience as free subjects of the rule of law.

VI

Forte and the obligation to obey the law

There is much to agree with in David Forte's paper. But in the end, I remain unconvinced that his term "Pharisaism" denotes a clear and helpful concept rather than a bundling-together of vices better analyzed separately. And I remain unclear about how the legal system is supposed to "incorporate" and "provide for" a range of "justifiable non-compliance" or "legitimate opportunities for non-compliance."

In the classic moral reflection on law and the moral obligation to obey it, non-compliance with a legal rule interpreted according to its tenor is considered morally justifiable and legitimate on one or other of three types of ground: (i) "equity" (*epieikeia*) — the author of the rule would have agreed to this exception if he had considered the situation; (ii) desuetude — contrary custom is tolerated by the authorities to an extent which makes it unfair to demand compliance of any individual; (iii) injustice — for example, the unfairness or inequity of the burdens imposed by the rule. It seems to me that one or more of these considerations may well apply to some or all of the rules which Forte complains of, for example the rule about second kitchens. Of course, our legal system does not generally permit the judges to apply these moral considerations as such in the application of the law in findings of guilt or liability. But they are considerations which are highly relevant at the sentencing stage, and English courts make fairly wide use of the absolute discharge after conviction.

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[43] See now the new footnote 1 to Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1 (1990).

If non-compliance cannot be brought within one or more of the classic grounds, it seems to me to be more of an "affront to the legal system" than is civil disobedience of the type familiar in the English-speaking nations in modern times. The non-compliance which Forte has in mind seems to be covert and (if not on one or other of those three grounds) self-serving. But civil disobedience is a public manifestation of allegiance to the law:

> Civil disobedience involves essentially (i) overt violation of a law, (ii) to express one's protest against that law, or against something public closely connected with some application of that law, together with (iii) ready submission to the law's sanctions. The violation must not involve doing anything otherwise immoral, and its manner and circumstances must make it clear to observers, not only that *symbolizes* opposition to some important and clearly identified matter of law or policy, but also that this opposition seeks justice not advantage.[44]

If it is true that since 1980 my insistence on the presumptive moral obligation to obey the law has "become even more pronounced," it is also true that that insistence remains coherent with my acknowledgement, indeed insistence, that that moral obligation, being presumptive and affirmative, can give way to other moral responsibilities. The generic moral obligation to obey the law, despite its presumptive character and its defeasance by competing moral responsibilities, is not empty of significance for the morally upright citizen.[45] For it is never overridden by considerations of convenience or desire or preference, as such.

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[44] J. FINNIS, J. BOYLE & G. GRISEZ, NUCLEAR DETERRENCE, MORALITY AND REALISM 355 (1987). For my exploration of the conditions on which such civil disobedience is morally justified, see *id.* at 354-57.

[45] This is not the place to restate the *grounds* for affirming that obligation. For a fairly recent treatment, see Finnis, *Law as Co-ordination*, 2 RATIO JURIS 97-104 (1989) and my works there cited.